

Saskowski, Ronald

From: Smith, Stephen
Sent: Thursday, June 25, 2015 2:33 PM
To: McCall, Carolyn
Cc: Lodin, Marianne; 35AveSiteFile; Saskowski, Ronald; Hammond, Richard
Subject: FW: 35th Avenue Site
Attachments: WC 104(e) Response with Exhibits and Cover Letter.pdf; removed.txt

Carolyn – Attached is Walter Coke’s initial response to the 104(e) request.

Rich/Ron – Do you mind adding the below email and attachment to SDMS for the 35th Avenue Superfund Site? Thanks so much.

Stephen P. Smith
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U.S. Environmental Protection Agency, Region 4
Office of Regional Counsel
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From: Bob Mowrey [mailto:bmowrey@kmcllaw.com]
Sent: Thursday, June 25, 2015 2:27 PM
To: Smith, Stephen
Cc: Lodin, Marianne; Max Zygmunt
Subject: 35th Avenue Site

Stephen, the attached correspondence and attachments comprise Walter Coke’s initial response to EPA’s most recent 104(e) request.

If you have any questions, please give me a call.

Regards,
Bob



Atlanta * Washington kmcllaw.com

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June 25, 2015

VIA: Email

Stephen Smith, Esq.
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street
Atlanta, GA 30303-89060

Re: 35th Avenue Superfund Site

Dear Stephen:

Enclosed please find Walter Coke's initial response to EPA's May 21, 2015 Request for Information, which was received on May 26, 2015. Note that Walter Coke has asserted a confidential business information claim over portions of the response and exhibits, and also that the response requests an advanced confidentiality determination under 40 C.F.R. §2.206 with respect to certain insurance policy "buy-back" agreements that are responsive to the request.

If you have any questions, please give me a call.

Sincerely,

Robert D. Mowrey

cc: Marianne Lodin
Max Zygmunt

WALTER COKE, INC'S RESPONSE TO EPA'S SECTION 104(e) REQUEST FOR INFORMATION RELATING TO THE 35TH AVENUE SUPERFUND SITE

Walter Coke, Inc. ("Walter Coke") responds to the Request for Information Pursuant to Section 104 of CERCLA for the 35th Avenue Superfund Site Birmingham, Jefferson County, Alabama (the "Site") (dated May 21, 2015, and received May 26) as follows:

GENERAL OBJECTIONS AND STATEMENTS OF LIMITATIONS

1. Walter Coke objects to each request for information to the extent that the request exceeds the scope of permissible information gathering and access under CERCLA § 104(e) [42 U.S.C. § 9604(e)].
2. Walter Coke objects to each request to the extent that the request seeks information concerning entities other than Walter Coke. Walter Coke's review to determine the existence of any responsive documents and information is limited to "Walter Coke, Inc."
3. Walter Coke objects to each request for information to the extent that the request seeks a response that is protected by any privilege or immunity, including but not limited to the attorney-client privilege and the attorney work-product doctrine.
4. Walter Coke objects to each request for information to the extent that the request is unduly burdensome and or is not sufficiently definite or specific.
5. Walter Coke objects to each request for information to the extent that the request seeks information that is not relevant to the matters set forth in CERCLA § 104(e)(2) [42 U.S.C. § 9604(e)(2)].
6. Walter Coke objects to each request for information to the extent that the request requires Walter Coke to provide information or documents already in EPA's possession or that may be obtained by EPA from another source that is more convenient, less expensive, or less burdensome.
7. Walter Coke objects to each request for information to the extent that the request requires Walter Coke to review or analyze documents to obtain information not specifically known by Walter Coke's officers, agents, or employees.
8. Walter Coke objects to each request for information to the extent that the request requires Walter Coke to identify and produce each document that is responsive to each individual request, because such a requirement is unduly burdensome and not required by law.

9. Walter Coke objects to each requests for information to the extent that the request purports to require investigation and review of documents from any person or entity whose role in matters related to the Request for Information was and is purely ministerial or insubstantial, or who is not employed by or under contract with Walter Coke. Such requests are unduly burdensome, broad, and vague.

10. Walter Coke objects to the “Instructions” and “Definitions,” because they are overbroad and unduly burdensome. Walter Coke also objects to the “Instructions” and “Definitions” to the extent they purport to impose duties on Walter Coke beyond those contained in CERCLA § 104(e).

11. Walter Coke objects to each request for information to the extent that it is framed so as to imply or assert that Walter Coke is liable for any or all conditions associated with the Site, which liability Walter Coke expressly denies, and further Walter Coke states that by responding to any request, it is not admitting any liability of any kind. To the extent any information provided by Walter Coke may mention or relate to other companies, including parents, affiliates, or subsidiaries, the provision of that information is not a concession or admission of any liability on the part of Walter Coke or any such other company, and any such liability is expressly denied.

Subject to the foregoing objections, and without waiving any objection, after a reasonable search of its records and review to determine the existence of responsive documents, if any, that are consistent with the limitations stated herein and within its custody currently, Walter Coke responds herein to the Request for Information based on information that it possesses at this time. Because Walter Coke’s investigation in this matter is ongoing, Walter Coke reserves the right to supplement any response with additional information as it becomes available.

RESPONSES TO INFORMATION REQUEST QUESTIONS

- 1. Provide copies of all casualty, liability and/or pollution insurance policies, and any other insurance contracts referencing the site or facility (including, but not limited to, Environmental Impairment Liability, Pollution Legal Liability,**

Cleanup Cost Cap or Stop Loss Policies, Institutional Controls and Post Remediation Care Insurance). Include any and all policies providing the Respondent with liability insurance relating to the Site property.

Notice

Walter Coke considers the contents of this response to include confidential business information. This response should be treated as "company confidential"

Walter Coke objects to this request because it requests "all" insurance policies without specifying particular timeframes that EPA may consider relevant or coverage levels EPA would consider reasonably related to its potential claims. This Question and Questions 3, 5, 9, and 10 (which refer to a "period being investigated as identified in Question 1") make plain that EPA intended—but failed—to identify such a "period being investigated." Such a period may have provided a meaningful scope to Question 1 and its absence renders the request incomplete, overly broad, insufficiently definite, unduly burdensome, vague and ambiguous, and not susceptible to an effective response.

Further, the request as framed could be construed to improperly ask Walter Coke to make determinations as to whether any particular policy would provide coverage for any claims EPA may have, and Walter Coke expressly denies making any admissions of any kind as to coverage or non-coverage by virtue of attempting to construe EPA's request in a reasonable manner. Additionally, Walter Coke objects to this request to the extent that it seemingly requests information from entities or about entities other than Walter Coke or its affiliates. To the extent any information provided by Walter Coke may mention or relate to other companies, including parents, affiliates, or subsidiaries, the provision of that information is not a concession or admission of any liability on the part of Walter Coke or any such other company, and any such liability is expressly denied.

Walter Coke also objects to this request because it is vague and ambiguous insofar as it implies that insurance policies would or should relate to a "site" that is ill defined and includes large numbers of property parcels that are outside the boundaries of the Walter Coke facility.

Subject to and without waiving the foregoing objections, and in an effort to be as cooperative as possible in the face of the request's failure to define, among other things, a meaningful temporal scope to Question 1, Walter Coke states the following:

Walter Coke's insurance coverage is supplied by its parent company, Walter Energy, Inc. (Walter Energy). To the best of Walter Coke's knowledge and belief, other than

commercial general liability (CGL) policies discussed in this Response, it does not have other policies fitting within the description in Question 1. (b) (4)

(b) (4)

2. To the extent not provided in Questions 1 above, provide copies of all insurance policies that may potentially provide the Respondent with insurance for bodily injury, property damage and/or environmental contamination in connection with the Site and/or Respondent's business operations. Include, without limitation, all comprehensive general liability, primary, excess, and umbrella policies.

Walter Coke objects to this request because it is vague and ambiguous and appears to be entirely duplicative of Questions 1. To the extent EPA intends this question to be distinct from Question 1, Walter Coke does not perceive the distinction despite its best

efforts to do, and Walter Coke is not required to guess at what distinctions EPA intends to draw. Walter Coke further incorporates by reference the objections and responses set forth in response to Question 1. Walter Coke further states that, subject to the foregoing objections, it is unaware of policies beyond those discussed in response to Question 1.

3. To the extent not identified in Questions 1 or 2, provide all other evidence of casualty, liability and/or pollution insurance issued to Respondent for the period being investigated as identified in Question 1.

Walter Coke objects to this request because it is vague and ambiguous and appears to be entirely duplicative of Questions 1 and 2. To the extent it is not intended to be duplicative, Walter Coke again does not perceive the distinction despite its best efforts to do so and Walter Coke is not required to guess at what distinctions EPA intends to draw. Walter Coke further objects that this Question is incomplete, vague and ambiguous, and not susceptible to a response insofar as it refers to a “period being investigated as identified in Question 1” because no such period is identified in Question 1. Walter Coke further incorporates by reference the objections and responses set forth in response to Questions 1 and 2. Walter Coke further states that, subject to the foregoing objections, the response to Question 1 identifies the potentially relevant insurance policies for the time period covered in Attachment “A”.

4. If there are any such policies from Questions 1, 2, or 3 above of which you are aware but neither possess copies, nor are able to obtain copies, identify each policy to the best of your ability by identifying:

- a. The name and address of each insurer and of the insured;**
- b. The type of policy and policy numbers;**
- c. The per occurrence policy limits of each policy; and**
- d. The effective dates for each policy.**

Walter Coke incorporates its objections and responses to Questions 1, 2, and 3.

5. Identify all insurance brokers or agents who placed insurance for the Respondent at any time during the period being investigated as identified in Question 1, and identify the time period during which such broker or agent acted in this regard. Identify by name and title, if known, individuals at the agency or brokerage most familiar with the property, pollution and/or liability insurance program of Respondent and the current whereabouts of each individual, if known.

Walter Coke objects to this Question because it is incomplete, vague and ambiguous, and not susceptible to a response because it refers to the nonexistent “period being investigated as identified in Question 1.” Walter Coke further objects to this request because it seeks information outside the scope of permissible information gathering under CERCLA § 104(e), including without limitation because there is no rational basis to conclude that the

information sought is relevant to EPA's basic inquiry unless, potentially, there are periods of time for which insurance policies are identified but cannot be supplied or periods of time for which policies might be expected to exist but are not identified or supplied. EPA's failure to identify a period of time it considers relevant to any of its requests makes it impossible for Walter Coke to determine whether either of these conditions that might make EPA's Question germane (and therefore permissible) may exist. Upon EPA's further request and clarification of the scope of and the basis and rationale for this request, Walter Coke will provide further appropriate response.

6. Identify all previous settlements by Respondent (or Respondent's predecessors) with any insurer which relates in any way to environmental liabilities and/or to the policies referenced in Questions 1-4 above, including:

- a. The date of the settlement;
 - b. The scope of the release provided under such settlement;
 - c. The amount of money paid by the insurer pursuant to such settlement.
- Provide copies of all such settlements agreements.

Notice

Walter Coke considers the contents of this response to include confidential business information. This response should be treated as "company confidential." Further, this response requests an advance determination of confidentiality for certain materials requested by EPA.

Walter Coke objects to this request to the extent that it implies that Walter Coke has ever been liable for or the subject of liability with respect to "environmental liabilities." Walter Coke further objects to this Question because it is vague and ambiguous and not susceptible to a response insofar as it refers to, but does not define, "environmental liabilities." Walter Coke further objects to this request to the extent that it seeks information protected by any privilege or immunity, including the attorney-client privilege and the attorney work-product doctrine. Walter Coke further objects to this request insofar as it simultaneously asks Walter Coke to describe (including making legal conclusions regarding) certain aspects of such agreements and to provide them. EPA is equally able to extract the requested information from the agreements. Walter Coke also objects that the terms and conditions of certain agreements responsive to this request are subject to various confidentiality requirements and Walter Coke is unable to fully supply a response until, at a

minimum, the prerequisites of such confidentiality requirements are determined to have been met.

Subject to these objections and the general objections, and without waving the same, Walter Coke states the following:

(b) (4)

(b) (4)

(b) (4)

(b) (4)

- 7. Identify all communications and provide all documents that evidence, refer, or relate to claims made by or on behalf of the Respondent under any insurance policy referenced in Questions 1-4 above. Include any responses from the insurer with respect to any claims.**

Walter Coke objects to this request to the extent that it seeks information protected by any privilege or immunity, including the attorney-client privilege and the attorney work-product doctrine. Additionally, Walter Coke objects to this request, because it is overly broad and burdensome, requiring the identification of “all communications” and the

production of “all” documents “on behalf of the Respondent under any insurance policy referenced in Questions 1-4 above.” Walter Coke also objects to this request because it seeks information outside the scope of permissible information gathering under CERCLA § 104(e), including without limitation communications concerning the settlements described in response to Question 6, inasmuch as there is no basis to believe such communications are relevant to EPA’s basic inquiry.

Subject to these objections and the general objections, and without waving the same, Walter Coke states that, apart from the settlements described in response to Question 6 and communications associated with such settlements, Walter Coke has provided notice of potential claims associated with the 35th Avenue Site to certain excess insurance carriers.

8. Identify any and all insurance, accounts paid or accounting files that identify Respondent’s insurance policies.

Walter Coke objects to this request to the extent that it seeks information outside the scope of permissible information gathering under CERCLA § 104(e) for the same reasons described in response to Question 5. Walter Coke also objects to this request because it is unnecessarily duplicative of Questions 1-7, overly broad, not sufficiently definite or specific, vague and ambiguous, unduly burdensome, and not calculated to lead to any information beyond what is provided in response to Question 1 that is relevant to EPA’s basic inquiry.

9. List all named insured on property, pollution and/or casualty liability insurance providing coverage to Respondents during the period being investigated as identified in Question 1, and the date such named insured appeared on the policies.

Walter Coke incorporates Response 1 by reference.

10. Identify any person or organization requiring evidence of Respondent’s casualty, liability and/or pollution insurance during the period being investigated as identified in Question 1, including the nature of the insurance requirement and the years when the evidence was required.

Walter Coke objects to this request to the extent that it seeks information outside the scope of permissible information gathering under CERCLA § 104(e) and is not relevant. Also, Walter Coke objects to this request because it is incomplete, overly broad, vague, and ambiguous, including without limitations in that it refers to the nonexistent “period being investigated in Question 1.” Walter Coke cannot reasonably guess at what EPA means by a “person or organization requiring evidence of . . . insurance during the period being investigated in Question 1.”

11. Identify Respondent's policy with respect to document retention.

Subject to the general objections, and without waving the same, Walter Coke's document retention policy is attached as Attachment "B."

12. Provide the name and address of Respondent's accountant who prepares or reviews the Respondent's annual report, and provide a copy of the most recent annual report.

Walter Coke does not prepare an annual report. Walter Coke's parent corporation (Walter Energy, Inc.) prepares an annual report submitted to and available online from the U.S. Securities and Exchange Commission. *See, e.g.,* <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000837173&owner=exclude&count=40&hidefilings=0>.

13. Complete the enclosed form "EPA Financial Statement for Businesses."

Walter Coke objects to this request, because it is unclear. The Request for information sent to Walter Coke on May 21, 2015 did not contain any form entitled "EPA Financial Statement for Businesses." Rather, the request contained the form "Financial Statement of Corporate Debtor." Walter Coke is unclear whether the Question, the attachment, or both are erroneous. Also, as has been communicated to EPA informally, review of the form attached to EPA's request suggests that it was not designed for submission to a publicly traded company, raising further confusion by Walter Coke as to what EPA intended. Walter Coke further objects because the enclosed form is overly broad, unduly burdensome, and exceeds the scope of EPA's authority under CERCLA §104(e) because, for an entity such as Walter Coke, much of the information sought is publicly available. Upon further request from EPA clarifying these issues, Walter Coke will provide further appropriate response.

In addition, Walter Coke states that its parent company, Walter Energy, has disclosed to the United States in recent SEC filings to following:

Over the course of the last three years, our results of operations, including our operating revenues and operating cash flows, have been negatively impacted by weak coal market conditions, depressed metallurgical coal prices, reduced steel production and global steel demand. Our cash flows from operations were insufficient to fund our capital expenditure needs for 2014 and 2013 and we expect this trend to continue in 2015. If market conditions do not improve, we expect our liquidity to continue to be adversely affected. On April 15, 2015, the Company elected to exercise the 30-day grace period under the terms of the indentures governing its 9.50% Senior Secured Notes due 2019 and its 8.50% Senior Notes due 2021 to extend the timeline for making the cash interest payments due on April 15, 2015. The aggregate amount of

the interest payments is approximately \$62.4 million. During the 30-day grace period, the Company is working with its debt holders to establish a capital structure that will position the Company to weather a highly competitive and challenging market.

Walter Coke has further disclosed to the SEC in a May 15, 2015 filing:

The constraints on our liquidity due to weak to generate sufficient growth in our operating revenues and operating coal market conditions and depressed metallurgical coal prices, coupled with our highly leveraged capital structure and the interest payment default, raise substantial doubt about our ability cash flows to meet our financial obligations beyond 2015, as well as our ability to continue as a going concern, despite our implementation of measures designed to conserve cash and reduce operating expenses and capital expenditures.

The referenced ongoing work with debt holders on a capital structure and the referenced issue as to the ability to continue as a going concern has the relatively imminent potential to affect Walter Coke's response to Question 13. Thus, Walter Coke will supplement and update this response (i) within 10 days in accordance with email communications between EPA and Walter Coke's outside counsel concerning the timing of this response, and (ii) thereafter as necessary or appropriate as work with debt holders continues. Further, and notwithstanding the foregoing, Walter Coke has communicated to EPA the need to confer on the scope of the form attached to this request, but such a conference has not been possible prior to the submission of this response.

14. Identify all of Respondent's current assets and liabilities.

Walter Coke objects to this request because it is overly broad, not sufficiently definite or specific, and is unduly burdensome. Walter Coke also states that its parent company, Walter Energy, has disclosed to the United States in SEC filings:

Over the course of the last three years, our results of operations, including our operating revenues and operating cash flows, have been negatively impacted by weak coal market conditions, depressed metallurgical coal prices, reduced steel production and global steel demand. Our cash flows from operations were insufficient to fund our capital expenditure needs for 2014 and 2013 and we expect this trend to continue in 2015. If market conditions do not improve, we expect our liquidity to continue to be adversely affected. On April 15, 2015, the Company elected to exercise the 30-day grace period under the terms of the indentures governing its 9.50% Senior Secured Notes due 2019 and its 8.50% Senior Notes due 2021 to extend the timeline for making the cash interest payments due on April 15, 2015. The aggregate amount of the interest payments is approximately \$62.4 million. During the 30-day grace period, the Company is working with its debt holders to establish a capital structure that will position the Company to weather a highly competitive and challenging market.

Walter Coke has further disclosed to the SEC in a May 15, 2015 filing:

The constraints on our liquidity due to weak coal market conditions and depressed metallurgical coal prices, coupled with our highly leveraged capital structure and the interest payment default, raise substantial doubt about our ability to generate sufficient growth in our operating revenues and operating cash flows to meet our financial obligations beyond 2015, as well as our ability to continue as a going concern, despite our implementation of measures designed to conserve cash and reduce operating expenses and capital expenditures.

The referenced ongoing work with debt holders on a capital structure and the referenced issue as to the ability to continue as a going concern has the relatively imminent potential to affect Walter Coke's response to Question 13. Thus, Walter Coke will supplement and update this response (i) within 10 days in accordance with email communications between EPA and Walter Coke's outside counsel concerning the timing of this response, and (ii) thereafter as necessary or appropriate as work with debt holders continues.

15. Identify the annual profits of [site/company] for the past 5 years to present.

Walter Coke objects to this request because it is overly broad and burdensome and not sufficiently definite or specific.

Subject to the foregoing objections, and without waving the same, Walter Coke refers EPA to Walter Energy's publicly available SEC filings and annual reports. *See, e.g.*, <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000837173&owner=exclude&count=40&hidefilings=0>; <http://investorrelations.walterenergy.com/phoenix.zhtml?c=71978&p=irol-reports>.

16. Provide a copy of the most current Articles of Incorporation and By-laws of Respondent.

Walter Coke objects to this request to the extent that it seeks information outside the scope of permissible information gathering under CERCLA § 104(e) and is not relevant.

Subject to these objections and the general objections, and without waving the same, *see* Attachments "C" and "D."

17. Provide copies of all income tax returns, including all attachments thereto, submitted by you to the Internal Revenue Service, the State of X, and any other state in which tax returns were filed for the last (5) years.

Walter Coke objects to this request to the extent that it seeks information outside the scope of permissible information gathering under CERCLA § 104(e) and is not relevant.

Walter Coke further objects that the request is vague and ambiguous insofar as there is no “State of X.”

Subject to and without waiving the foregoing objections, Walter Coke states that its parent company, Walter Energy, is responsible for income tax filings. Substantial information on the contents of Walter Energy’s tax return for calendar years 2012, 2013, and 2014 are set forth at Note 10 of Walter Energy’s SEC 10-K filing (link provided in response 15 above). The contents of Note 10 are included in Attachment “E.” Should EPA conclude that more tax return information is warranted and communicates the same, Walter Coke will respond further at that time.

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